



## **ENVIRONMENTAL PROTECTION AGENCY**

### **40 CFR Part 52**

**[EPA-R08-OAR-2011-1025, FRL-9762-5]**

#### **Approval and Promulgation of Air Quality Implementation Plans; Colorado; Revisions to New Source Review Rules**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** EPA is taking final action to approve revisions adopted by the State of Colorado on December 15, 2005, to Regulation No. 3 (Air Pollutant Emission Notice and Permitting Requirements). Colorado submitted the request for approval of these rule revisions into the State Implementation Plan (SIP) on August 21, 2006. The revisions remove repealed provisions in Regulation No. 3 that pertain to the issuance of Colorado air quality permits; the revisions also implement other minor administrative changes and renumbering. The intended effect of this action is to take final action to approve the rules that are consistent with the Clean Air Act (CAA.) This action is being taken under section 110 of the CAA.

**DATES:** This final rule is effective [insert date 30 days after publication in the Federal Register].

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. EPA-R08-OAR-2011-1025. All documents in the docket are listed in the [www.regulations.gov](http://www.regulations.gov) Web site. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted

material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in [www.regulations.gov](http://www.regulations.gov) or in hard copy at the Air Program, Environmental Protection Agency (EPA), Region 8, 1595 Wynkoop Street, Denver, Colorado 80202-1129. EPA requests you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8:00 a.m. to 4:00 p.m., excluding Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Kevin Leone, Air Program, Mailcode 8P-AR, Environmental Protection Agency, Region 8, 1595 Wynkoop Street, Denver, Colorado 80202-1129, (303) 312-6227, or [leone.kevin@epa.gov](mailto:leone.kevin@epa.gov).

**SUPPLEMENTARY INFORMATION:**

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**Definitions**

For the purpose of this document, we are giving meaning to certain words or initials as follows:

- (i) The words or initials Act or CAA mean or refer to the Clean Air Act, unless the context indicates otherwise.
- (ii) The words EPA, we, us or our mean or refer to the United States Environmental Protection

Agency.

(iii) The initials SIP mean or refer to State Implementation Plan.

(iv) The words State or Colorado mean the State of Colorado, unless the context indicates otherwise.

## **I. Background Information**

On December 31, 2002, EPA published revisions to the federal Prevention of Significant Deterioration (PSD) and non-attainment NSR regulations. These revisions are commonly referred to as “NSR Reform” and became effective nationally in areas not covered by a SIP on March 3, 2003. The NSR Reform revisions included provisions for baseline emissions determinations, actual-to-future actual methodology, plantwide applicability limits (PALs), clean units, and pollution control projects (PCPs). On June 24, 2005, the United States Court of Appeals for the District of Columbia Circuit issued its decision and opinion in the case of New York v. U. S. Environmental Protection Agency, 413 F.3d 3 (D.C.Cir. 2005). The court concluded that, regarding the clean unit exemption from NSR, the plain language of the Clean Air Act indicated that Congress intended to apply NSR to changes that increase actual emissions instead of potential or allowable emissions. As a result, the court vacated the clean units portions of the Federal Rule. The court also concluded that EPA lacks the authority to create pollution control project exemptions from NSR and vacated the PCP portions of both the 1992 WEPCO Rule and the 2002 NSR Reform rule. By vacating those portions of the Federal NSR rule, the court terminated those exemptions to new source review. The court also remanded back to EPA the “reasonable possibility” standard for when a source must keep certain project related records.

The State of Colorado submitted a formal SIP revision on July 11, 2005, followed by a supplemental submittal on October 25, 2005. These submittals requested approval for regulations to implement the NSR Reform provisions that were not vacated or remanded by the June 24, 2005 court decision; including renumbering, reorganizing, and revised definitions. On April 10, 2012 (77 FR 21453), EPA published a notice of final rulemaking for the July 11, 2005, and October 25, 2005 submittals. In that action, EPA approved renumbering, reorganizing and portions of Colorado's revisions to the Stationary Source Permitting and Air Pollutant Emission Notice Requirements (Regulation No. 3) that incorporate EPA's December 31, 2002 NSR Reform; however, EPA considered as withdrawn the portions of the submittals that implemented the clean unit and pollution control project exemptions. EPA also approved a version of the recordkeeping requirements that removed the "reasonable possibility" standard.

Colorado adopted revisions on December 15, 2005, and submitted these revisions, which we are addressing in this action, on August 21, 2006. These revisions reflect the removal of references to clean units, pollution control projects, and the "reasonable possibility" standard from the State's rules. As a result of the deletion of these references, many provisions were renumbered and references to them updated. The submittal also included other minor administrative changes to Regulation No. 3.

Colorado's August 21, 2006 submittal supersedes the portions of the Colorado's July 11, 2005 and October 25, 2005, submittals which were considered withdrawn in our April 10, 2012 action. EPA is taking final action on these revisions in this rulemaking.

## **II. Response to Comments**

EPA proposed action on these revisions on July 9, 2012 (77 FR 40315.) We accepted comments from the public on this proposal through August 8, 2012. EPA received no comments during the public comment period.

## **III. What are the Changes EPA is Taking Final Action to Approve?**

EPA is taking final action to approve all revisions to Regulation No. 3 as submitted on August 21, 2006, with one exception, including renumbering that resulted from removing provisions that were vacated or remanded in the June 24, 2005 court decision, as well as minor administrative changes. We are not approving the removal of provisions that were considered withdrawn in our April 10, 2012 action (77 FR 21453), as these provisions were never approved into the SIP. We are only approving the renumbering that resulted from Colorado's removal of those provisions from Regulation Number 3. In a number of instances, the provisions that were approved in our April 10, 2012 action contain italicized and underlined text. As explained in our April 10, 2012 notice, the italicized text was to be added to the SIP and the underlined text removed from the SIP upon our approval of the NSR reform provisions. As that approval was completed in our April 10, 2012 action, in this action we incorporate only the plain and italicized text of the renumbered provisions.

The exception stems from a final action EPA took on January 9, 2012 (77 FR 1027). In that action, we approved revisions to Regulation Number 3, Part C, that were submitted on August 1, 2007 to meet the requirements of the Phase 2 Implementation Rule for the 1997 ozone NAAQs (70 FR 71612, Nov. 29, 2005). As the August 1, 2007 submittal was subsequent to the August 21, 2006 submittal we are approving today, the provisions we

approved in our January 9, 2012 action (listed in Table 2 of 77 FR 1027) already reflect the renumbering of Part C and supersede the provisions in the August 21, 2006 submittal. As explained in our January 9, 2012 notice, the subsequent approval of the remaining renumbering of Part C—which we are carrying out today—resolves any discrepancy in the numbering of Part C.

As part of the NSR Reform rule, EPA allowed sources to calculate their actual and projected actual emissions to determine whether a modification will trigger NSR. If a source concludes that there is no "reasonable possibility" that emissions from a project will trigger NSR, the source is not required to keep records substantiating that calculation. However, the data and records would necessarily be generated by the owner or operator to calculate its emissions.

Colorado did not follow the federal rule in this regard. In Section I.B.5., Colorado imposes a requirement that owners or operators using the actual-to-projected-actual applicability test for a project that requires a minor source permit or modification [pursuant to Part A, Section I.B.26.; Part C, Section I.A.3.; or Part C, Section X.; or any minor source permit under any provisions of Part B], submit an otherwise-required permit application and include documentation adequate to substantiate calculations made for the test.

The June 24, 2005, D.C. Circuit court opinion also addressed the recordkeeping and reporting requirements of the federal rule. The 2002 rule excused a source from maintaining records of the information and calculations used in the actual-to-projected actual applicability test if the source determined that there was no "reasonable possibility" that the modification would trigger NSR. These are the same records

necessary to substantiate calculations made for the applicability test. The court concluded that lack of evidence, in the form of data and records, could inhibit enforceability of the NSR program in this context. The court remanded this part of the rule. On December 21, 2007, EPA published a final rule in response to the D.C. Circuit Court's remand of the recordkeeping provisions of EPA's 2002 NSR Reform Rules (see 72 FR 72607) in which EPA clarified what constitutes "reasonable possibility". 72 FR 72607 established a "percentage increase trigger" by which there is a reasonable possibility that a change would result in a significant emissions increase if the projected emissions increase of a pollutant – determined by comparing baseline actual emissions to projected actual emissions – equaled or exceeded fifty percent of the applicable NSR significant level for that pollutant.

The State of Colorado requires sources retain records that, among other things, are essential to substantiate sources' calculations using the actual-to-projected-actual applicability test. Colorado also requires that a source submit its data and calculations along with a permit application that would otherwise be required for the physical or operational change. Colorado reviews the data and calculations only to confirm a source's conclusions whether it triggers NSR. The information submitted is then included in a non-enforceable appendix to a source's Title V Permit or as a permit note in the source's construction permit. Accordingly, Colorado elected not to modify Part D, Section I.B.5. and to modify Part D, Sections V.A.7.c. and VI.B.5. in a manner that maintains consistency with Section I.B.5. Part D, Sections V.A.7.c. and VI.B.5 were previously approved in 77 FR 21453(April 10, 2012). EPA finds that the current Regulation No. 3 recordkeeping requirements are at least as stringent as in 72 FR 72607.

#### **IV. What Action is EPA Taking Today?**

Based on the discussion in this notice, EPA finds that the renumbering resulting from Colorado's removal of vacated and remanded provisions from the June 24, 2005, court decision, and other minor administrative changes meet applicable requirements of the Act; and thus, the revisions are approvable under CAA section 110. Therefore, we are taking final action to approve Colorado's Regulation No. 3 revisions as submitted on August 21, 2006. Specifically, we are taking final action to approve the renumbering—with the exception of renumbered provisions already approved in our January 9, 2012 action—resulting from the deletion of the following provisions:<sup>1</sup>

Part C, Section I.A.7.j

Part D, Section II.A.23.d.(viii)

Part D, Section II.A.27.c.(iv)

Part D, Section II.A.27.g.(v)

Part D, Section I.B.3.

Part D, Section I.D.

Part D, Section II.A.11.

Part D, Section II.A.35.

Part D, Section XV.

Part D, Section XVI.

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<sup>1</sup> The provisions approved in our January 9, 2012 action are Regulation Number 3, Part C, Sections II.A.22.a, II.A.24.d, II.A.38.c, and II.A.42.a. Also, in our proposal for this action we proposed to delete Part A, Sections V.E.10 and V.E.11, and Part C, Section I.A.7.j from the SIP. However, these provisions were never approved into the SIP so deletion of them is unnecessary. The deletion of Part A, Sections V.E.10 and V.E.11 did not cause any renumbering; however, the deletion of Part C, Section I.A.7.j did cause renumbering and we are approving the renumbered sections.



We are approving the renumbering of the existing Regulation No. 3 rule because these changes are non-substantive and do not affect the meaning of the rule. The renumbering changes are outlined in the August 21, 2006 state submittal (see docket).

## **V. Statutory and Executive Order Reviews**

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this final action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A major rule cannot take effect until 60 days after

it is published in the Federal Register. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by [insert date 60 days from date of publication of this document in the Federal Register]. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds, Incorporation by reference.

Signed

November 27, 2012  
Dated: \_\_\_\_\_

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Howard M. Cantor,  
Acting Regional Administrator,  
Region 8

40 CFR part 52 is amended as follows:

## **PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS**

1. The authority citation for Part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 et seq.

### **Subpart G - Colorado**

2. Section 52.320 is amended by adding paragraph (c)(125) to read as follows:

#### **§52.320 Identification of plan.**

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(c) \* \* \*

(125) On August 21, 2006, the State of Colorado submitted revisions to 5 CCR 1001-5, Regulation Number 3, Air Pollution Emission Notice and Permitting Requirements. The August 21, 2006, submittal included renumbering and deletions of Regulation Number 3. The incorporation by reference in paragraphs (c)(125)(i)(A) and (B) of this section reflect the renumbered sections, deletions and reference changes as of the August 21, 2006, submittal.

(i) Incorporation by reference

(A) 5 CCR 1001-5, Regulation Number 3, Stationary Source Permitting and Air Contaminant Emission Notice Requirements, Part C, Concerning Operating Permits, Section I, Applicability, I.A., Definitions; I.A.7.j., adopted December 15, 2005 and effective March 2, 2006.

(B) 5 CCR 1001-5, Regulation Number 3, Stationary Source Permitting and Air Contaminant Emission Notice Requirements, Part D, Concerning Major Stationary Source New Source Review and Prevention of Significant Deterioration, adopted December 15, 2005 and effective March 2, 2006:

(1) Section I, Applicability, I.A., General Applicability; I.A.2., I.B., Applicability Tests; I.B.3., I.B.4.

(2) Section II, Definitions; II.A.; II.A.1., Actual Emissions; II.A.1.d.; II.A.11., Complete; II.A.12., Construction; II.A.13., Emissions Unit; II.A.14., Electric Utility Steam Generating Unit; II.A.15., Federal Land Manager (FLM); II.A.16., High Terrain; II.A.17., Hydrocarbon combustion flare; II.A.18., Innovative Control Technology; II.A.19., Low Terrain; II.A.20., Lowest Achievable Emission Rates (LAER) (excluding underlined text); II.A.21., Major Emissions Unit; II.A.22., Major Modification (excluding II.A.22.a. and underlined text); II.A.23., Major Source Baseline Date; II.A.24., Major Stationary Source (excluding II.A.24.d. and underlined text); II.A.25., Minor Source Baseline Date; II.A.26., Net Emissions Increase (excluding underlined text); II.A.27., Nonattainment Major New Source Review (NSR) Program; II.A.28., PAL Effective Date; II.A.29., PAL Effective Period; II.A.30., PAL Major Modification; II.A.31., PAL Permit; II.A.32., PAL Pollutant; II.A.33., Plantwide Applicability Limitation (PAL); II.A.34., Prevention of Significant Deterioration (PSD) Permit; II.A.35., Project; II.A.36., Projected Actual Emissions; II.A.37., Reactivation of Very Clean Coal-fired Electric Utility Steam Generating Unit; II.A.38., Regulated NSR Pollutant (excluding II.A.38.c.); II.A.39., Replacement Unit; II.A.40., Repowering (excluding underlined text); II.A.41., Secondary Emissions; II.A.42., Significant (excluding II.A.42.a.) ; II.A.43., Significant Emissions Increase; II.A.44., Significant Emissions Unit; II.A.45., Small Emissions Unit; II.A.46., Temporary Clean Coal Technology Demonstration Project; XV., Actual PALs.

(ii) Additional material.

(A) Notice of Final Adoption, dated 12/15/2005, signed by Douglas A. Lempke, Administrator, for revisions made to Regulation Number 3, Air Pollution Emission Notice and Permitting

Requirements.

**[FR Doc. 2013-00579 Filed 01/23/2013 at 8:45 am; Publication Date: 01/24/2013]**